No. 10743

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AARON FERER & SONS, a co-partnership,

Appellant,

vs.

RICHFIELD OIL CORPORATION, a corporation,

Appellee.

APPELLANT'S CLOSING BRIEF.

CARL B. STURZENACKER &
PHILIP N. KRASNE,
505 Taft Building, Los Angeles 28,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX.

PAGE

V.

VI.

TABLE OF AUTHORITIES CITED.

PAGE

STATUTES.

TEXTBOOKS. PAGE

No. 10743

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AARON FERER & SONS, a co-partnership,
Appellant,

vs.

RICHFIELD OIL CORPORATION, a corporation,
Appellee.

APPELLANT'S CLOSING BRIEF.

Appellee's Statement of Facts.

In the statement of facts set forth in appellee's brief in trying to support the theory that various items indicate its intention to exclude well casings from the sale to Ferer & Sons, many items are irrelevant even for that limited purpose. For example, the fact that Montgomery instructed Kelly to take steps for the removal of rods and tubing in wells, because they were in a precarious condition but to refrain from removing the casings, which were not in a precarious condition, has no tendency to show that later, and in a different transaction the Richfield Corporation did not intend to sell the casings. Nor does the fact that Montgomery gave said instructions to Kelly "after the matter had been recommended at one of the executive meetings." add color to the event or give it meaning. This follows because it must be assumed

that the executive group took no action in the matter or some record thereof would have been produced. The fact that in a previous contract with A. M. Anderson no provision was made for the removal of casings has no tendency to prove that in the subsequent and considerable later sale of equipment and facilities not removed by Anderson the casings were not intended to be sold. In fact evidence relative to the Anderson transaction tends to establish, if it bears on that question at all, that in the later transaction casings were intended to be sold, because all of the equipment and facilities sold to Ferer & Sons were retained and excluded from the Anderson contract and the inference logically results that Richfield's intention, as distinguished from the intention of Mr. Montgomery, in making the sale to appellant was to dispose of everything left after Anderson's operations had been completed. It is said, (Rep. Br. p. 7). "During the summer of 1940 it was decided at one of the executive meetings to make a combination sale . . . and Kelly was instructed to sell the surface equipment." This statement is wholly without evidentiary support. Appellee clearly implies that Kelly was instructed by action taken *at one of the executive meetings* to sell surface equipment, but appellee did not produce an iota of evidence to sustain that assertion. Other statements on pages 7 to 11 inclusive, concerning instructions purporting to have come from some executive meeting or made by an employee of the defendant are equally without foundation and irrelevant because no proof whatever was produced to show that *any official* action was taken at any executive meeting of the persons whom Montgomery and others called "management", and there is a like dirth of evidence to show that the defendant corporation authorized McGahan to tell Zeidenfeld or Ferer that

"surface equipment" would be sold, or that the defendant had any intention other than that evinced by the written contract. These and other similar items of which the statement of facts chiefly consists will be discussed and devitalized under the appropriate captions. At this point appellant merely desired to challenge the statement of facts generally as not warranted by the record.

I.

No Prior Meeting of the Minds or Oral Agreement Was Established.

A very considerable portion of appellant's opening brief is devoted to the thesis that no agreement was proved to have been made in the instant transaction other than the written contract dated January 17, 1941, whereas it is a prerequisite to reformation of a written contract that a prior agreement be established. This thesis is set forth and elucidated under caption I., pages 35 to 75 and further in the discussion of the findings. As presented by appellant this is of major importance in the decision of this appeal. Opposing counsel's reply to the presentation of this issue in the opening brief, is as brief, indefinite and evasive as was the statement of the trial judge concerning the same subject, which statement is set forth in appellee's brief, page 20. It will bear repetition. Judge Hollzer said: (Rep. Br. p. 20.)

> "When you (plaintiff's counsel) ask for the bill of particulars of the oral contract, I am wondering whether anything more can be said. In other words, if the theory of the defendant is that this oral agreement is based, not upon what was said at some particular hour, or some particular day of a particular month or year, but rather, you must take

into consideration the series of conversations involving a number of individuals, and when you analyze them in their entirety, then you come to the conclusion that orally the parties determined to put into writing the particular understanding, such as that recited in the counter-claim, but, through inadvertence or mutual mistake, or, if you please, the mistake of one of the parties, which the other knew was being made, the wording of the written contract failed to conform to what the parties had orally said to be the terms of the written contract".

It is apparent that plaintiff's counsel had requested some statement as to when and where the supposed prior agreement was entered into, and who participated in making it, and, what, in substance at least was said to evidence that the minds of the parties met upon the terms set forth in the written agreement as later modified by the court's decree. Such a request would not have been unfair or presumptuous. It is the right of any litigant whose property rights are about to be taken from him by a court decree to know that every legal essential to such harsh and extraordinary procedure has been duly established. Judge Hollzer's reply is a definite confession that he could not name any of the material particulars. As to the persons who made the prior agreements the only information given was that "a number of individuals" had "a series of conversations" and thus "orally the parties determined to put into writing the particular understanding". We know from the evidence that if we exclude the loose statements of "individuals" who had no authority to negotiate this or any contract for their employers, it is not the truth that "a number of individuals" took part in a "series of conversations". Again, neither the court nor opposing counsel could state

any date or approximate time when anyone, even including the unauthorized McGahan, Zeidenfeld and Kelly, ever agreed upon a single term or provision of the contract in writing, much less the entire agreement which it evidences. Search the reply brief from cover to cover and no such conversation between anyone connected, even remotely, with this transaction will be found. The record shows and the truth is that both parties dealt in generalities entirely until Mr. Ferer made a written offer for what he understood Richfield had to sell which with certain modifications Richfield accepted. The offer is plaintiff's Exhibit 2 and the acceptance is plaintiff's Exhibit 3 and the language of both instruments is all-inclusive, limited only by the exceptions which Richfield expressly specified. When it came to drafting the written agreement Richfield added to the exceptions but *in none of these writings were casing of the oil wells excepted from the sale.* Richfield's able attorney, Mr. Paradise, declared that the court had stated his client's theory "exactly" (Rep. Br. p. 20) and had, in a statement even more general and brief than that above quoted "epitomized" defendant's contention. The statement of the court referred to only proves that even the jurist had no idea that a prior agreement had actually been entered into. He said that negotiations had been carried on over a period of some weeks and "out of those negotiations we may, and should draw certain conclusions, particularly that the fair inference to be deducted from those negotiations is that the *parties intended to enter into the contract pleaded,*" in defendant's counter-claim.

This was a guarded non-committal expression of the court's viewpoint which shows, that based upon the premise that negotiations had extended over some weeks, the court *surmised,* he said inferred, something. What

did he surmise? That the parties *intended* to enter *into a contract,* etc. He did not surmise or even purport to infer that they *entered into* a contract, but merely that they *intended to* enter into a contract. What *contract?* Not that contract pleaded *but one of that type.* This can import nothing more than a contract to sell some oil field equipment and facilities upon some terms which would be satisfactory to both parties. It is not too much to say that both Judge Hollzer and Mr. Paradise well knew that nothing more toward actually entering into a contract prior to the one prepared by Richfield's attorney had taken place.

Appellant's opening brief called upon defendant to point out the evidence from which the existence of a prior contract could be inferred. Opposing counsel have failed to produce even the beginning of such a "bill of particulars". Their utmost efforts have merely brought out indications of *intentions* and intentions are the limit in the findings of the court.

For counsel's information, and not addressed to the court, perhaps the following elementary principles will clarify the problem:

A contract is an agreement between persons, upon sufficient consideration, to do or not to do a particular thing;

Mutual promises, made at the same time, are sufficient considerations for each other;

There must be a meeting of the minds of the parties upon the same thing, and in the same sense, at the same time; *without which there can be no contract;*

Four things are necessary:

1. *Parties able to contract*;

2. A sufficient consideration;

3. A subject matter to be contracted for;

4. *An actual contracting by proposal on the one side and acceptance on the other.*

The foregoing principles are set forth in "Robinson's Elementary Law", a standard text commonly used in law schools.

The subject matter of the instant contract is generally oil field equipment and facilities. According to appellee's witnesses those who could contract for it were "management" and Mr. H. H. Kelly and Harold David were authorized to negotiate this contract. Mr. Ferer was able to contract for appellant, and no one else, so said he, and there is no proof to the contrary. Hence, the contention of appellant as made in its opening brief is that none of said authorized agents of Richfield ever, at any time prior to January 17, 1941, made a proposal which Ferer & Sons by its authorized agent accepted concerning the sale of the subject matter of said contract or accepted a proposal in reference to the same which was made by the authorized agent of Ferer & Sons. Of course a proposal and acceptance that a certain pump or that a pile of brick or that casings should be included or excluded in the sale would not constitute a contract for sale of the subject matter. Also a contract may be implied from conduct and circumstance, as where "A" makes a proposal and "B" acts upon it. "B's" acceptance will be presumed, but acting upon "A's" proposal involves doing something which, according to the proposals, "B" would do if the parties had so stipulated by an ex-

press contract. No decision has ever held that a contract is implied where "A" merely uses data which "B" has given for purposes of investigation of "B's" property or as the basis upon which to made an offer. Nor has it ever been held that from the fact that the parties had "discussed" the purchase by one and the sale by the other of certain property, it will be presumed that they entered into a contract for the sale and purchase of the property. The fact that in addition there had been "discussions" of the nature of the work to be performed on the property by the purchaser, could not perfect the basis for a presumption that a proposal by one party and an acceptance by the other had eventuated. These are the only evidences except one other, of the alleged prior contract which appellee has produced in its attempt to meet appellant's challenge. (Resp. Br. p. 21.) However, appellee naively asserts "even appellant will not challenge . . . that the price of $22,000.00 had been agreed upon;". It must be borne in mind that all of these matters are claimed by appellee to have occurred in oral conversations. The foregoing assertion is naive to a point almost beyond belief. Having presumably read appellant's opening brief with reasonable care opposing counsel must have known if able to understand and retain, the import thereof, that appellant had most definitely challenged the proposition above set forth. There is no testimony of any witness that the sum of $22,000.00 was ever mentioned in any conversation. The nearest approach to such testimony was given by David Zeidenfeld who said that he told Mr. Ferer that "if he was interested in buying that property, he would have to bid somewhere in the amount of $20,000.00 (Rep. Br. p. 436). Zeidenfeld said on cross-examination that he "picked up" this figure "in going around among people

who might have been bidding" or "from some person". He said, "I would not swear to it under oath but I believe I did mention to Mr. Ferer about $20,000.00 might take the deal on a lump sum basis", etc. [R. p. 439]; He also testified: "I don't think Mr. McGahan ever mentioned the sum of $20,000.00 to me . . . I will say that Mr. McGahan didn't give me any actual information of $20,000.00; that as far as that figure is concerned I took it on myself, to say that that will be the amount that will buy the deal from my discussions with Mr. McGahan, although he didn't give me the exact amount." [R. p. 452.] McGahan said, "I asked him whether anyone of several figures would get the deal and that McGahan declined to answer but I thought he smiled when I mentioned the figure of $20,000.00." [R. p. 453.] Morris Ferer swore that Zeidenfeld "did not tell me that it would take about $20,000.00 . . . to make an acceptable bid. He did not ever mention a sum in connection with this." [R. p. 821.] The foregoing reveals the type of circumstances upon which appellee argues that a prior oral agreement is legally presumed to have been entered into, and the foregoing is the evidence which seems so convincing that opposing counsel, no doubt *sincerely* asserts, "even appellant will not challenge that . . . the price of $22,000.00 had been agreed upon." It might be supposed that the failure of McGahan to testify that he told Zeindenfeld that the bid would need to be $22,000.00 or even $20,000.00, or to admit that he "smiled" when Zeidenfeld mentioned the sum of $20,000.00, would have suggested to defendant's

counsel that even if two minor employees could make a contract for Richfield, and Ferer & Sons, minus McGahan's smile the supposed contract was unilateral and assented to only by the buyer.

Appellant's opening brief, pages 11 and 12, quotes or cites five decisions, California and Federal, and other authorities which hold that the first essential to the right to reform a written contract is proof of a prior contract. Appellee selects the two Federal decisions and attempts to show that they hold otherwise, and in fact support appellee's theory that the prior agreement may consist of intentions to make a contract and nothing more. In this behalf appellee says of *Columbian National Life Ins. Co. v. Black* that the opinion actually reversed the decision of the lower court on the ground that *it denied reformation* and held "on facts much weaker than those present in the instant case, that a sufficient prior agreement to permit reformation was present." It is believed that appellee's counsel has failed to industriously analyse the opinion in that case, which shows that the prior contract consisted of a written application by Black for a particular type of policy, to-wit, the company's "ordinary life plan", and an acceptance of the offer by the company concerning this prior agreement the opinion shows that there is ample authority for the proposition that when an insurance company approves the application as made, and issues a policy, "there is, at that moment, a meeting of the minds—an agreement *to issue the policy applied for.*"

Hence, as a matter of law, as settled by precedent, the proof of the prior agreement was complete, uncontradicted and conclusive. To compare it, as weaker, with the mere secret intentions of the parties which the court inferred or conjectured from the fact that the parties had carried on negotiations "for weeks", is as palpably a fallacy as would be exhibiting a black object and declaring that it is white.

However, the court fully recognized the law to be as the defendant Black contended, and said, as quoted in the opening brief that before a writing may be reformed to express a real agreement "the parties must have agreed." The mistake in that case consisted of the fact that the printer "used the form of an ordinary life policy for the first page, but on the reverse side had erroneously used a form for an "endowment policy". Here, again, the evidence of the mistake, and the manner in which it was made cannot be compared with the factual situation in the instant case, in which there is neither evidence or finding as to the essential element; how and by whom the mistake was made, and there was an entire lack of competent or substantial evidence that any mistake was actually made. The opinion in the *Columbian Company* case, said "without resorting to any oral evidence, the papers in this case on their face bear conclusive proof of the mistake that can be and should be corrected in equity." This statement obviously true, for a comparison of the application and its acceptance with the policy which was issued revealed the mistake. Oral uncontradicted evidence established how and by whom it was made.

Appellee points out that the opinion in *Fidelity Guaranty Fire Corp. v. Belquist,* 108 Fed. (2d) 715, quoted by appellant, recognized that the prior agreement may be implied. To be sure any contract may be implied if the facts warrant it, but nowhere in the reply brief does appellee bring to the court's attention any fact or matter not mentioned by Judge Hollzer in response to plaintiff's request for "a bill of particulars" of what constituted the prior agreement, and, as has been shown the trial court failed and impliedly confessed that it could not comply with the request. The weakness and lack of point in appellee's criticisms of the foregoing cases is emphasized by the failure of the reply brief to discuss or attempt to distinguish the California cases cited or quoted in the opening brief which also sustain the rule that proof of prior agreement is essential to the right to reform a written instrument. These cases are set forth on pages 12, 76 and 77 of the opening brief, among which are those to which civil code Section 3399 was held to be applicable.

Among such decisions is *Auerbach v. Healy,* 174 Cal. 60 and *Carpenter v. Froloff,* 30 Cal. App. (2d) 400. Cases of that type hold that the proof must show that the parties had a prior "understanding" in respect to some particular term or point, which the written contract fails to include or which it excludes (*Moore v. Vandermast,* 19 Cal. (2d) 94).

In the absence of such understanding, which is a part of an entire prior agreement, the rest of which is

properly set forth, the agrieved party's remedy is rescission but not reformation, because to reform a contract where no prior contract had been entered into would require that the court *create a new agreement* upon which the minds of the parties had never met. If, as the reply brief implies the decisions in the *Guaranty Fire Corporation v. Belquist* and *Columbian National Life* cases, support appellee's theory that no prior agreement need be shown, "the sole requirement being that it is necessary to ascertain the intentions of the parties to the transaction", (Rep. Br. p. 18), appellant will be glad to rest this issue upon this court's interpretation of these two cases.

In support of its theory appellee cites *Cutting Co. v. Peterson,* 164 Cal. 44 wherein a cause of action was held to have been sufficiently alleged to comply with civil code Sec. 3399. In that case the written contract was worded exactly as the parties intended, and the entire controversy was waged over their understanding the price at which the sales under the contract should be made. "This requirement of Peterson was communicated to the Cutting Co. by Oliphant and that company thereupon agreed that the contract should contain a provision to that effect," but insisted that this should apply to its general printed price list and not to special prices made by the company to particular customers. Oliphant said that Peterson then agreed to this arrangement. Thereupon Oliphant drafted the contract which both parties signed. The company failed to issue a printed general list of prices for the season in question, and the company sought reformation of the

written contract to make it conform to the implied provision specifying that the buyer, Peterson, should not pay a price higher than the opening prices fixed for the trade generally of the association. However, the opinion clearly shows that there had been a prior oral agreement. It is recited that Mr. Oliphant, a broker acted as "go-between or mutual agent of both parties" and talked with Peterson and with officers of the company. He testified that when he talked with Peterson the latter said that he would not agree to enter into the proposed contract unless he was assured it contained a clause guaranteeing him against the opening prices fixed by the association so that if the association should name prices for the season lower than the prices named in the agreement, then the association's prices prevail.

Section 3399 has made no change in the rules governing reformation of contracts, except to add to the ancient ground of mutual mistake, mistake of one party which the other suspected, and this additional ground differs from fraud only in that, although the suspecting party owes no duty to the other, he may not remain silent while the other acts to his prejudice. Reformation, as a remedy still presupposes a prior contract, and the rule to that effect stated in *Auerback v. Healy* and *Carpenter v. Froloff*, both *supra*, has not been abrogated, nor has appellee distinguished them from the instant case.

II.

The Court Erred and Abused Any Discretion Which It May Have in Ordering the Count of Appellant's Complaint Wherein Declaratory Relief Sought, Dismissed.

Appellee contends that the Trial Court correctly sustained its motion to dismiss the first cause of action in the complaint by which declaratory relief was sought. However, appellee's brief is not specific and leaves the reader to speculate upon the theory or theories relied upon to support that contention. The brief first dissents from appellant's statement that Judge Hollzer's ground for dismissing this count was the conclusion by him that no substantial controversy existed between the parties, as shown by his "memorandum of conclusions." In that behalf, appellee's brief, (p. 23), quotes Judge Hollzer's opinion in which it is recited that according to the affidavit of H. H. Kelly, the defendant had notified plaintiff of its contention that it "did not sell to plaintiff said casing" and that it would prevent plaintiff from removing the same. The opinion is also quoted as saying "the damages arising from the breach of the written contract pertain to the sale and delivery of personal property," and the court adds, "and that plaintiff is not entitled to declaratory or equitable relief." Appellant fails to see in these statements an indication that they were intended to embody its ground for dismissing the declaratory relief count. We are impelled to reject that theory because to adopt it would impute to the trial court a degree of unfamiliarity with the Federal Declaratory Relief provisions which it is hardly reasonable or fair to assume. The portion of the opinion first quoted merely concedes and confirms the allegation of the plaintiff's pleading that an "actual controversy between the parties exists", which is an essential

ingredient of a proper case for declaratory relief. Nor is the second portion of the opinion apposite as a statement of a ground for refusing to take jurisdiction. Federal Courts undoubtedly have jurisdiction to decide rights pertaining to personal property and by N. S. C. 28:400, it is expressly provided that in addition to declaring the rights of the parties the court may grant further relief whenever necessary or proper. *Stephenson v. Equitable Life Assur. Soc., etc.,* 92 Fed. (2d) 406. *Moore's Fed. Prac.* Vol. III, 1938 Ed. p. 3119, note. In *Zenie Bros. v. Miskend,* 10 Fed.. Supp. 779, a case relied upon by appellee, the District Court denied a motion to dismiss and declared that the complaint did not go too far in asking for an injunction and damages saying, "Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper . . . If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated, to show cause why further relief should not be granted forthwith."

It does seem a bit strange that opposing counsel overlooked this note in one of their prize decisions when citing it as holding that declaratory relief will not be granted where such a judgment "would serve no useful purpose." Also, as pointed out in Appellant's opening brief, in view of Rule 57 it is hardly open to dispute that, as Ohlinger (Vol. 3, p. 779) says even "the right to trial by jury is saved" and the District Court, having determined that an actual, present, justifiable controversy existed, had the right and the duty to try, with or without a jury, the issue of damages, if he believed it necessary to grant complete relief and prevent piece-meal litigation." At any rate it can hardly be assumed that the trial judge did not know the law to be as above quoted, and if he did

it would be illogical to suppose as appellee argues that his ground for granting the motion to dismiss was that the controversy related damages to personal property and that no equitable relief could be granted.

Of course an injunction might issue to prevent the defendants from interfering with the removal by plaintiff of property which it had purchased and owned, and the court had ample power to take evidence and decide the issue as to damages.

Appellee's Indefinite Theories.

It has been said that in discussing the issue now being elucidated, appellee's theories are obscure. On pages 24 and 25 of its brief appellee cites California Code Sections and cases to show that for four distinct reasons "specific performance was properly denied." In the expressive vernacular typical of General Patton, appellant asks, "So what?" Appellee's brief does not attempt to answer the question. Almost in the same breath it points out that appellant's count I asked for damages. Immediately thereafter and in the same discussion it cites the *Zenie Bros. v. Miskend, supra,* case which clearly indicates that damages may be, and in proper cases should be granted, and the same decision holds that "constitutional Federal Courts' judicial power is broad enough to cover suits authorized by Declaratory Judgment Act in cases of actual controversy, proceedings for such judgment being justiciable as concerning existing controvery between parties capable of binding determination." (See Syllabus, point 2). It further holds that a judgment in such a case is not merely advisory but constitutes a binding determination. So, why peruse statutes and decisions dealing with the essentials prerequisite to granting specific performance? The issue of appellant's right

to specific performance is a false quantity in this case for three reasons:

1. A complete case for Declaratory relief is presented for a determination of the rights of the parties without reference to any other relief;

2. If specific performance could not be had the court has the power to award damages;

3. Specific performance was not asked in Court I. Numbers 1 and 2 have been discussed. The code sections and cases relied upon by appellee are irrelevant and wholly inapplicable to the facts as they appear in Count I and as Judge Hollzer describes them in his "memorandum of conclusions". We have here, not a contract to sell but *a sale*. The contract was fully executed by Ferer and Sons. It had paid the full purchase price for every item of property comprised in the written contract. Payment had been made for the well casings and Ferer & Sons had removed everything except the casings which it had purchased. The only thing left to be done by Ferer & Sons was to remove the casings, and acts incidental thereto. Nothing was required of the Richfield Company, except to cooperate in such removal if necessary. However, defendant claimed that it still owned the casings and threatened to prevent plaintiff from removing the property which it had paid for. Hence the primary relief sought was a Declaratory Judgment in the nature of a decree adjudging that plaintiff had contracted and paid for and purchased the well casings and was the owner thereof. In an action to quiet title where plaintiff's title is confirmed, if out of possession, he is entitled to a writ of possession even though

the judgment makes no provisions for such writ (22 Cal. Jur. p. 194; *Keele v. Clouser,* 92 Cal. App. 526; *Park v. Powers,* 2 Cal. (2d) 590). Also, the court may and often does enjoin the defendant from claiming any right, title or interest in or to the property in question (*San Diego Imp. Co. v. Brodie,* 215 Cal. page 97). Authority for the above statement that in substance and effect the instant declaratory relief count stated a cause of action to quiet title. In *Davis v. American Foundry Company,* 94 Fed. (2d) 441, the suit was for a declaration of plaintiff's rights in a contract. It was alleged that the defendant had broken the agreement by its failure and refusal to pay four installments provided for therein and alleged to be past due. The District Court dismissed the suit and the court of appeals reversed the judgment, and in that behalf said:

> "But it is observed that the question in controversy is the validity of the contract which has an admitted value of at least $9,500.00. Plaintiff sought the aid of the court in the form of a decree declaring the contract void. This is a suit not for coercive relief but for damages thus far approved but rather for declaratory relief. True, it is that the plaintiff might not invoke the court's jurisdiction in a suit to recover $2,000.00 in money but this suit is for other relief. It is in the nature of a suit to quiet title by which equity jurisdiction is involved in order to secure the decree of non-existence of the apparent clouds on one's title. So, here plaintiff seeks to have the court remove any doubt from the validity of the contract in such a situation to exercise jurisdiction under the Declaratory Act is not to extend the jurisdiction of

> the court, but merely to hasten the day when that jurisdiction may be invoked and as in suits quieting title the amount in controversy is the value of the thing which it is said is encumbered with a voidable cloud."

Hence, appellee's reason "1" is wholly inapplicable. In none of the cases cited in support of that reason was the sale of personal property completed. In each of them the seller was required to make delivery, upon which event, the buyer's payments became due. In *LeMoyne Ranch v. Agajanian,* 121 Cal. App. 423, the contract contemplated that the seller must acquire the garbage and then deliver it to the buyer. In such cases, the relief sought is, actually specific performance. Appellee's reason "2" is obviously irrelevant. No "succession of acts continuous in their nature", as appellee claims, are involved. It can be of no moment that Ferer & Sons was required to perform a succession of acts in removing all of the equipment which Richfield sold them, since only one act was in controversy and the rest had been performed. Appellee's reason "3" is factually non-existent. No personal services by the defendant were required by the instant contract. Appellee fails to point them out, and none are involved. Number "4" is not apposite. The issues of mutuality of remedy only arises where the contract is executory as to both of the contracting parties. It is absurd to compare the situation herein involved with such cases as *Poultry Producers etc. v. Barlow,* 189 Cal. 278, which appellee cites as authority under reasons 2, 3 and 4. The contract upon which that action was based was a marketing

agreement by which the plaintiff corporation was required to receive and sell the poultry to be raised by Barlow and others and they bound themselves to deliver and accept the proceeds, less certain costs, which the corporation should collect for the poultry. This contract involved a multiplicity of transactions with each poultry raiser and much detail concerning the duties of the parties. However, we here have the second instance in which a case cited by appellee provides a final and negative answer eliminating a proposition for which the case is cited, and showing that the same is irrelevant to the facts of the instant case. In discussing the question of mutuality of right to relief it is pointed out in *Poultry Producers* decision that under Section 3386 of the Civil Code, if the plaintiff "has performed . . . all or substantially all of his obligations", the rule against specific performance which requires that there be mutuality of right to relief does not apply. In the instant case *Ferer & Sons* had paid the total purchase price and they had removed all of the equipment which they had purchased from Richfield Company except the well casings which the Richfield Company refused to permit plaintiff to take. It follows that under the doctrine of the *Poultry Producers* decision and the express provisions of Civil Code Section 3386 the mutuality rule upon which appellee relies in no way concerns that case because here the plaintiff had paid the full purchase price, and was entitled to have the cloud on his title resulting from the defendant's adverse claim, removed, and plaintiff had performed substantially all of the work which he contracted to do.

Appellee's More Specific Grounds.

The first named of these grounds is "The trial court has discretion whether or not to grant declaratory relief." This is a stock reason which we find advanced by appellees in all or nearly all of the cases where the trial court has dismissed or otherwise refused to entertain suits for such relief. However, in enumerating the grounds upon which it has been held that the trial court might properly exercise its discretion by dismissing the suit, appellee again blindly crosses itself up.

It is said: The parties should not be required to try their rights piece-meal and the trial court will deny declaratory relief when it would not accomplish a complete determination of all isssues.

Appellant readily subscribes to this doctrine. In fact we embrace and emphasize it as sound, and in so doing point out that this was one cogent reason which the court gave in *Zenie v. Miskend,* 10 Fed. Supp. 779, for holding that the plaintiff *was entitled to a declaratory judgment,* it being held, as has been shown, that the court would, if necessary to provide complete and full relief not only declare the rights of plaintiff but give such other relief in equity or in law as might be necessary to that end. So, in the instant case, had the trial court not recanted its views after deciding that the written contract clearly included the well casings in the sale to appellant, and if it had so adjudged, nothing remained to be done except to issue a writ of possession or an injunction against defendants interfering with the removal of the purchased property by its owner, Ferer & Sons. Also, if a judgment for damages were found to be merited the trial court had jurisdiction to award that relief—all in this action, and thus to remove *the necessity of piecemeal litigation.*

Appellee cites six other cases all of which uphold the right of the court to dismiss where a declaratory judgment "will not be effective in settling the alleged controversy and would serve no useful purpose." These decisions are one hundred percent sound but they are factually as far from the instant case as bitter is from sweet or as Jupiter is from the earth. For example, in *Angel, et al., v. Schram,* 109 Fed. (2d) 380, it was pointed out that an actual controversy did not exist and that the question which the plaintiff sought to have decided had to do with certain departments of the Federal Government and that these departments would not be bound by any decision which the court might render. Likewise in *Ohio Cas. Ins. Co. v. Murphy,* 28 Fed. Supp. 252, it appeared that Murphy had only a nominal interest in the issue alleged to be in dispute and others who were not parties to the action and would not be bound by a judgment therein were the only ones actually concerned. *State Farm, etc. Ins. Co. v. Hugee,* 32 Fed. Supp. 665, is on all-fours with the *Murphy* case, factually and in its decision, and so on down the list, in *Hoffman, Inc. v. Knitting Machines Corp., et al.,* 37 Fed Supp. 578, the court held that there "was justiciable controversy" and that the owner of the patent concerning which the controversy was alleged to pertain was not a party, and, of course, would not be affected by the outcome of the case if it were tried. In *Delno v. Market St. Ry. Co.,* 38 Fed. Supp. 341, a question was presented over which the California Railroad Commission had exclusive jurisdiction, and it is said "nothing which the Federal Court might have decided would settle the entire controversy." The other case cited by appellee in support of its assertion that the Federal District Court had discretion in the instant case to dismiss Count I, was one in which

a suit was pending in the state court and judgment had been rendered involving the very controversial question presented to the Federal Court. It was said that Federal Courts should not entertain such suits under these circumstances. This case is *Aetna Cas. & Sur. Co. v. Quarles,* 92 Fed. (2d) 321. The *Quarles* case does not contain even one morsel of aid and comfort for appellee, and it, like *Zenie Bros. v. Miskend, supra,* points out that 28 N. S. C. A. Sec. 400 (3) provides that if the issues raised in a suit of this nature are legal, they "must be tried at law if either party insists upon it," and it declares that the right to "a jury trial in an action at law may not be denied a litigant", and that this right must be protected in a suit for declaratory relief.

As has been shown, in the other six cases no controversy existed or a decision of the federal district court, if rendered, could not have finally settled the controversy and would not have bound the court or Board which, under the law, must have finally passed upon it. Not of lesser importance is the fact that the *Aetna Casualty, etc.* decision punctures appellee's conception of the discretionary latitute permitted federal trial courts in picking and choosing cases to be heard under the Declaratory Judgment Act. The opinion declares:

> "It is said by Judge Knight in the case of *Automotive Equipment v. Trico Products Corporation* however that the discretion to grant or refuse declaratory relief is a judicial discretion and must find its basis in good reasoning and is subject to an appellant review in proper cases. We think that the discretion should be liberally exercised to effectuate the purpose of the statute and thereby found relief from uncertainty and insecurity with respect to the statutes and other legal relations. See Borchard Declaratory Judgments, page 101."

Again it is said:

> "The statute providing for declaratory judgments meets a real need and should be liberally construed to accomplish proper intent, i.e., to furnish a speedy and inexpensive method of adjudicating legal disputes without invoking coercive remedies of the old procedures and settle legal rights and remove uncertainties and insecurity from legal relationship without awaiting a violation of the right or a disturbance of the relationship. Whether the remedy shall be accorded to the one who petitions for it is a matter resting in the profound discretion of the trial court to be reasonably exercised in furtherance of the purpose of the statute."

(To the same effect is *Zenie Bros. v. Miskend,* 10 Fed. Supp. 779.)

It thus appears that we need look no further than the cases cited by appellee for authority which reveals that its claims set forth on pages 23 to 27 inclusive of its brief are contrary to the law. These claims concerning the instant case are that a declaratory judgment would not have provided "a full or complete determination of all issues between the parties" because "any obligation to sell the casings in the wells was not specifically enforceable," "and any determination of whether appellant was entitled to damages" and "the amount of damages if any would have required further litigation." None of the foregoing decisions decide or discuss either of these matters, but they do definitely and unequivocably hold that having given a

judgment declaring the rights of the parties, the court has power to and must grant whatever further relief is warranted, legal or equitable, including damages and a jury trial, if either party demands it. Appellee persists throughout in the error of referring to the contract as creating an obligation "to sell," whereas as we have shown, the sale of the well casings was completed, the entire consideration was paid, and by Count I, the court was asked to so adjudge. Not permitting ourselves to overlook any decision cited by appellee attention is directed to *Mutual Life Ins. Co. v. Brannen*, 31 Fed. Supp. 123, which appellee refers to in support of the claim that Judge Hollzer properly gave consideration to the affidavit of H. H. Kelly in passing upon the motion to dismiss. The decision so holds and also it recognized that if the court had denied the motion and tried the case a jury trial might have been required and damages awarded. This was apparently the factor which persuaded the court to dismiss the case because it was said no jury would be in attendance for several months and suits on the same controverted matters were pending in a state court where an earlier jury trial could be had. It is apparent that appellee's purpose in calling attention to this decision is to justify the action of the trial court by which it gave consideration to the affidavit of H. H. Kelly. The cited case is valueless for its intended use because the facts stated therein show that the affidavit merely sustained plaintiff's averment in the first count that an actual present controversy then existed, which, of course, is one of the facts which must be shown to make out a case for declaratory relief.

Appellee's Theory That Where the Plaintiff's Cause of Action Has Fully Accrued a Declaratory Judgment Will Not Be Rendered Is Both Untenable and Inapplicable.

Appellee's final theory in support of the validity of the court's order by which the declaratory relief count was dismissed is that the Judge concluded that "if" the written contract included the casings in the wells "appellant's remedy was limited to damages; that this remedy is primarily consequential relief and is not relief for which an action may be maintained seeking a declaratory judgment. Five decisions are cited as sustaining this theory. Before discussing them we digress to point out that in the case last above mentioned, *Mutual Life Ins. Co. v. Brannen, supra,* the situation was precisely the same as that depicted by appellee as above set forth, but in the Mutual Life Ins. Co. opinion the court stoutly asserted that a proper case for declaratory relief was shown. Thus, once again, a decision vouched for as sound by appellee, strikes back and refutes one of the doctrines upon which the reply brief relies. We return to the list of five decisions, the first of which is one with which we are already well acquainted, to-wit, *Deeno v. Market, etc. Co.,* 38 Fed. Supp. 341. This decision contains not one word opposite to the proposition above set forth. The sole reason assigned for the dismissal of the case was that the California Railroad Commission had exclusive jurisdiction over the controversy, and that a federal court has no power to interfere with the orders of that commission; hence a declaration of the rights of the parties by the federal court would "not settle the entire controversy" and it would therefore be "improper for the federal court to accept jurisdiction."

The question arises, why has not appellee quoted some language from this and other if its counsel regard them as worth citing rather than leaving it to the court and appellant's counsel to make a miscroscopic examination of every case in search of some excuse for their use apparently taken at random and which, at the end of the inspection leaves the analyst still in the dark as to why the cases were cited.

Turning now to the other four cases cited by appellee, all California state decisions, it will be seen that they are not in point. Apparently appellee claims that the proposition which they decide is that under the California Declaratory law if the controversy only concerns obligations of parties resulting from a cause of action which has fully accrued, it is not within the purview of said law. Appellee cites these cases:

Brix v. People's Mutual Life Co., 2 Cal. (2d) 446;
Standard Brand, etc., v. Bryce, 1 Cal. (2d) 718;
Orloff v. Met. Tr. Co., 17 Cal. (2d) 484;
Fritz v. Superior Court, 18 Cal. App. (2d) 232.

This legal proposition, even if it were established, under the California law would be unimportant because under the Federal Declaratory Judgments Act the federal decisions have not recognized this irrational limitation on the court's power.

Secondly, the facts of the instant case exclude it from the rule stated by appellee.

In this case the controversy was and is a *continuing one, not pertaining to relief but concerning the rights of the parties.* Hence the principle of law announced in the foregoing decisions, even if it were settled law and interest-

ing to contemplate, can be of no aid in deciding whether the trial court abused its discretion in dismissing appellant's Declaratory relief count in the instant case. It is believed that opposing counsel have misconceived the purport of the rule upon which they rely and it will be seen that the decisions cited by appellee do not warrant its interpretation of them.

In the *Fritz* case the court was asked to determine the validity of an election of certain persons as officers in a corporation. The pleadings showed that since the election in question a new set of officers had been chosen, hence it was said, "No such controversy exists or could exist under the factor pleaded." Also it was held that the trial court was warranted in dismissing the action because Section 315 of the Civil Code expressly provides a special remedy for the determination of election contests. Still a third reason given for dismissing the action is, the opinion states, that the question of the validity of the election was "moot".

Each of the grounds above named have been held to warrant the dismissal of a suit for declaratory relief under the Federal Declaratory Judgments Act. (See *Uhlingers Federal Practice*, Vol. 3, pp. 751, 773.)

The nearest that the Fritz decision comes to upholding the rule contended for by appellee is that the opinion states that the cause of action had "already accrued and the only question for determination is the liability or relief for or to which the respective parties are charged." This is far from saying that declaratory relief cannot be granted because of the mere fact that "the cause of action has already accrued and other California cases have upheld declaratory judgments wherein the cause of action had

accrued." (See *Strong v. Hancock,* 201 Cal. 550, and *Brix v. People's Mutual Life Ins. So., supra*). Hence, the court of appeal could hardly have intended to announce that the California Declaratory Judgments Act does not include within its purview any actual controversy concerning rights or titles if based upon transactions which have already transpired.

In the *Brix* case the trial court had rendered a judgment for the plaintiff of $1,300.00 for monthly indemnity payments as provided by an accident insurance policy because of total and continuous disability, and which payment the insurance company had failed to make. The trial court also adjudged that the defendant pay the plaintiff $100.00 per month beginning at a certain date, "during the rest and remainder of the plaintiff's natural life." The first portion of the judgment was upheld, *although the cause of action* "accrued" *four months before the action was begun*, and the suit was for declaratory relief.

The controversy concerning the plaintiff's right to monthly payments then due and the refusal and failure of the insurance company to pay were (as was the plaintiff's right to the oil casings, and defendant's refusal to permit plaintiff to remove them in this case), actual and continuing issues.

In the *Fritz* case it was held error to award the plaintiff $100 for the rest of his life, because these installments *had not accrued and might never* accrue. It was said:

> "In the present action the breach of the contract was the failure of the defendant to pay the accrued installments. This default in the payment of these accrued installments did not work a breach of the entire contract, 'the contract still subsists as to future benefits, and the default only affects the rights of the parties

> as to benefits accrued. It is obvious that it does not work a breach as to future benefits, since, as to such, the liability of the defendant has not become fixed, but remains contingent upon the condition of the plaintiff being such as to entitle him to demand them'." (Robinson v. Exempt Fire Co., 103 Cal. 1, 3 (36 Pac. 955, 42 Am. St. Rep. 93, 24 L. R. A. 715).)

Instead of holding as appellee claims this case refutes its theory.

In *Orloff v. Metropolitan Trust Company, supra*, the gist of the action and the alleged violation of plaintiff's rights out of which the matters and relief sought by the various counts grew, was conspiracy between certain of the defendants to avoid the payment of a claim belonging to Orloff by assignment, and which, according to escrow instructions, should have been paid to his assignor out of money held in escrow. In the count seeking declaratory relief the plaintiff merely asked the court to review these facts and award him a judgment for $2,500.00. Without stating any reasons or ground the Supreme Court concludes: "These allegations do not measure up to the requirements of an action for declaratory relief.", and the opinion adds that the refusal to entertain a complaint for declaratory relief is discretionary and will only be reviewed for abuse of discretion.

The real basis of this decision is not made clear. It is plain that, if the complaint alleged no more facts than the opinion recites, the count lacked any allegations to show that there was any controversy except as to the form of relief and it would surely be no abuse of discretion for a court to refuse to entertain a case of that type. The remaining California cases cited by appellee on

this issue is *Standard Brands of California v. Bryce,* 1 Cal. (2d) 718. The plaintiff's complaint showed affirmatively that a tort had been committed upon the real property of Bryce. As to this there was no controversy It alleged that the defendants, Barrett and Hilp, building contractors, were liable and that Bryce was not liable, and asked the court to decide the rights and duties of the parties. The opinion in the case states (1 Cal. (2d), p. 721, beginning line 14):

> "The only distinction between the action as stated by the plaintiff and the action as it would have been stated had the defendant sued, is, as noted, that the person claimed to have caused the injury, instead of the owners of the property claimed to have been injured, is suing as the plaintiff. The action is now, therefore, declaratory in character, but in fact presents essentially the same issues which would be involved upon a determination of the cause of action which the complaint shows has already accrued, viz., the liability of the respective parties by reason of the acts and conduct claimed to have caused the injuries."

It is a familiar rule that every decision must be appraised by the facts of the case. One fact which may well have had weight was that Bruce was not a party to the contract between plaintiff and the contractors, which contract was decisive of the question in controversy, to-wit: which of the contracting parties was liable? A second matter was that if it had been held that this was a proper case for declaratory relief the plaintiff would have succeeded in litigating the matter in the county of its residence rather than in the county where the real property was located. The opinion states:

> "Consequently the plaintiff, by bringing the action itself in anticipation of the defendant Bryce's claim

> against it, and by joining other defendants upon whom it attempts to fasten the claimed liability and who reside in a county outside the county where the real property is situated, may not deprive the owners of the property of their right to a trial in the county where the real property is located. The plaintiff may not, by this device, choose its own forum and thus evade the statutory provisions which require a trial in Los Angeles County of any cause of action shown by the complaint to have accrued."

In view of these considerations it is plain that the court felt justified in upholding the trial court decision in dismissing the action and in doing so used language which is susceptible of an interpretation not in harmony with any other California decision or with authorities elsewhere. The court cites

12 *A. L. R.* 74-76;

50 *A. L. R.* 43, 44;

68 *A. L. R.* 119.

These notes fail, entirely, to sustain the text of the opinion pages 74, 76, 12 A. L. R. digest English causes only and do not mention the subject, nor do the other A. L. R. articles cited.

As previously pointed out, if the California Declaratory Judgments Act does not contemplate relief which is merely determinative of duties and liabilities of parties to a transaction already ended, this is of no moment in the instant case because:

1. This case was tried under the Federal law which does contemplate that exact situation, and includes just such cases among those in which declaratory relief may be granted.

2. In the instant case the transaction had not ended although Ferer & Sons might have instituted an action to quiet title, or a claim and delivery suit or have claimed damages for breach of contract. Yet the actual controversy pertained primarily to the rights of the parties and the question of liability was a secondary issue, and it was alleged that the defendant threatened to commit a further and continuing violation of the written contract in that it would prevent Ferer & Sons from removing the well casings which the contract had conveyed to the plaintiff. The court was called upon to construe the contract and determine the rights of the parties thereunder while the transaction was yet unfinished.

The Federal Law.

Ohlinger says: "However, it is clearly established that the authority of the court extends to declaration of *liabilities*. The Aetna case was reversed by the Supreme Court in Aetna Life Ins. Co. v. Haworth, (1937) 300 U. S. 227." (Emphasis added.) The author points out that in *Columbian Nat'l Life Ins. Co. v. Foulke,* 89 Fed. (2d), 261, 263, in passing on this question, said that "plaintiff's right to be immune from the claim of the defendant . . . is a 'right' which it may petition to have declared by the terms of Section 274-d (U. S. C. 28:400." To the same effect are *Farm Bureau, etc. Co. v. Daniel,* 92 Fed. (2d) 838 and *Am. M. Ins. Co. v. Busch* (D. C. Cal.) 22 Fed. Supp. 72.

Another line of Federal decisions refute the rule in the *Bryce* case as appellee construes it. These cases follow U. S. C. 28:400 (1), and the more specific provision of the Federal Rules of Civil Procedure which provides that "the existence of another adequate remedy does not pre-

clude a judgment for declaratory relief." The statute, itself, provides that the court has power to entertain a case, and declare the rights and duties of the parties, "whether or not further relief is or could be prayed," and in *Stephenson v. Equitable Life Assur. Soc.* 92 Fed. (2d) 406 this provision was construed as definitely authorizing the determination of rights *and obligations which had fully accrued* and for which an ordinary civil suit was maintainable. To the same effect are *Columbian Nat. Life Ins. Co. v. Foulke*, 89 Fed. (2d) 261 and *Zenie Bros. v. Meskend,* 10 Fed. Supp. 779. However, the Federal Rule above quoted speaks for itself and renders incontrovertible the power of the court to take jurisdiction in cases where the cause of action has fully accrued and the subject matter of the complaint shows that one or more other adequate remedies exist, and to determine the obligations and liabilities of the parties. Appellee's theory to the contrary is undoubtedly its trump card in the attempt to uphold the validity of the trial court's order by which the Declaratory Relief count was dismissed. It is believed that said theory has been shown to be untenable upon several legal grounds, and also that the factual situation presented herein removes it from the realm of the supposed rule. More space has been devoted to the matter than would ordinarily be desired or justified but this has seemed necessary as a result of the indefinite and incomplete manner in which the issue is presented the opposing brief.

III.

The Error and Abuse of Discretion Pointed Out Under the Last Caption, by Which the First Count of the Amended Complaint Was Dismissed Affected Prejudicially Appellant's Substantial Rights.

Opposing counsel put forth the claim that any error by the court below in sustaining the motion to dismiss was merely "formal or technical" error and does not affect the substantial rights of appellant, citing cases to show that such a rule exists and leaving to opposing counsel and the court to discover how said rule applies to the facts of this case. Such applicability of the rule may be, as appellee's brief says, "apparent" to it and its attorneys, but it seems mere probability that failure to point out, at least briefly, how and why error is not prejudiced, indicates that the task is difficult or insuperable. The error and abuse of discretion resulted in prejudice to the plaintiff in one outstanding respect, to-wit: had the motion been properly denied the findings of fact made later would necessarily have included a finding as to whether the parties to the written contract had ever previously entered into an agreement, oral or written, embodying the terms which the court, without legal authority added thereto by its decree, and which finding, as pointed out in appellant's opening brief, the court failed and wholly omitted in rendering its judgment herein. Again, had the motion to dismiss been denied, as shown in the opening brief, it was then established that no prior agreement was entered into between the parties, the motion for summary judgment, made and considered concurrently said motion to dismiss could not consistently have been denied. These motions should have been determined upon the record as made up

by the pleadings, affidavits and depositions pertaining thereto, and upon that record the motion for summary judgment must necessarily have been granted upon the various grounds set forth in the opening brief, all of which appellee's brief passes by without attempt at refutation. In granting the motion to dismiss count I the court considered and partly rested its decision upon an affidavit of H. H. Kelly, filed in opposition to appellant's motion for summary judgment. These two records were, therefore, merged in deciding the motion to dismiss. Hence the court must then have been aware that no prior agreement had been established and appellant's substantial rights were prejudiced by the failure of the court to so find and to have thus avoided the necessity of the subsequent trial and the delay incident thereto. The continued presence in the case, even if action upon the motions for summary judgment and to dismiss had been delayed, would have kept the court conscious of the issues presented by them and all of the findings to be made and, as shown in the opening brief, proper decisions on these motions were interdependent; but the court did not grant the motion for summary judgment and granted the motion to dismiss the declaratory relief count, and thus wiped the slate clean as to the cause of action therein set forth.

The prejudice to Ferer & Sons in this behalf is both specific and general, but the foregoing we believe suffices, especially in the absence of any attempt by opposing counsel to elucidate his proposition, to show prejudice to appellant by the improper dismissal of count I.

IV.

The Court Failed to Find That the Alleged Prior Agreement Excluded the Casings From the Sale.

Appellee asserts that finding 3 constitutes a finding of the terms of the alleged prior agreement, or, at least that with the aid of findings 4 and 5 that findings is evolved. Whether or not a prior agreement was ever entered into is a major issue in this case. Indeed, it is pivotal and determinative of the court's power to decree reformation. Appellant insists that no finding upon this question is made in finding 3, and that findings 4 and 5 cannot and do not supply the requirement. Appellee avers that finding 3 has not been challenged by appellant although practically all other findings have been attacked by it. The first portion of this statement is erroneous. The opening brief, pages 82 and 83, challenge finding 3 as a finding of ultimate facts which is invalidated by the fact that the specific evidentiary findings on the same matter do not support finding 3. On page 108 it is pointed out that finding 3 is one of those pertaining to the intentions of both parties—an ultimate fact, which has no support in the evidentiary findings or the evidence. Of course, findings of ultimate facts are merely general findings and if special findings are made general findings are superfluous. The Federal Rules of Civil Procedure (Rule 2.1.1) directs that "In all actions tried upon the facts without a jury, the court shall find the facts specially," etc., and by Rule 2.1.3 it is provided that requests for findings are not necessary for purpose of review. Finding 3 states that prior to January 17, 1941 (the date of the written contract), the seller and the buyer "made an agreement of sale," etc. Appellee must concede that thus far the find-

ing is general and, standing alone, is a pure conclusion. The sentence proceeds: "for the sale, for the sum of twenty-two thousand dollars ($22,000.00) special as to price of certain refinery and producing facilities and equipment (general as to articles sold) located on land at Casmalia, California (special as to place) owned by defendant, (general as to articles), and plaintiff agreed, among other things, to perform at its sole cost and expense certain work in connection therewith . . . (special as to the seller's obligations). The equipment and facilities to be sold consisted of various pipe lines, boilers, buildings, pumps, tanks, motors, engines, and scrap metal scattered over the property (general as to articles sold). Various items of facilities and equipment were expressly excluded from the sale," (special). Then follows a list of excluded articles in which well casings are not included. It is certain that this finding does not show that the alleged prior agreement included oil well casings, and with respect to the finding which relate to the property being sold the finding violates Rule 2.1.1 in that it is most general and decidedly not special. Finding 4 reads: "To evidence such agreement, plaintiff and defendant executed a written contract dated January 17, 1941 [Plaintiff's Exhibit No. 4]." Appellee sees in this a clarification of finding 3. It speaks for itself, and, appellant contends, in that behalf, it is meaningless. Finding 5 reads: "The written contract dated January 17, 1941, did not truly express the agreement or the intention of plaintiff and defendant in that it did not expressly provide (1) that the subject matter of the sale did not include the casing in any of the oil wells located on the land; and (2) that the plaintiff had no obligation, as part of the work plaintiff agreed to perform under such con-

tract, to abandon such oil wells or dismantle or remove or dispose of the casing contained therein." Opposing counsel say: "It is not apparent how a trial court could frame clearer findings of a prior agreement" than are contained in findings 3, 4 and 5. The answer is obvious. It could have added the oil casings to the list of items expressly excluded, according to finding 3, in the agreement alleged therein to have been made prior to January 17, 1941, and in like manner it could have found that by said prior agreement it was stipulated and agreed that plaintiff had "no obligation as a part of the work plaintiff agreed to perform under such contract to abandon such wells or to dismantle or remove or dispose of the casing contained therein." The simplicity with which a finding that the prior *agreement* to exclude the casings from the sale, might have been set forth makes it almost naive to assert, in effect, that by *an entire lack* of findings of such *agreement* the court actually finds the lack thereof to be a fact and as clearly as the English language could be made to do when employed by the counsel who drafted the findings and the trial judge who approved and signed them. The situation is reminiscent of a statement accredited to Mark Twain who philosophized that the stinger of a bee only extends a quarter of an inch and the other two feet is the victim's imagination. The instant finding that the written contract does not truly express the agreement or the intention of the parties because it omitted certain provisions, and absent a finding that the prior agreement contained a stipulation that oil casings were excluded from the sale, does not extend even "a quarter of an inch" in the direction of becoming the absent finding. It is definitely true, as appellee's brief reasons and states that "the court below was aware of and rejected the argument made

to it by appellant that there was no oral agreement," and this fact itself, and the certainty that the court below must have known that a finding of facts which merely indicates that to make a written contract conform to a prior agreement and actual intention of the parties it is necessary to reform the written contract and exclude the casings is not a finding that the prior contract excluded the casings. This is, in substance and effect, the meaning of finding 5, and a finding to the same effect was held insufficient to show the terms of the prior agreement in *Auerbach v. Healy*, 174 Cal. 60, where reformation was sought. Hence the omission in Finding 3 from the list of excluded items was not a mere oversight or an inadvertent misuse of language, similar to that assertedly made by Mr. Paradise in drafting the contract and sale agreement dated January 17, 1941. The law as announced in the cases quoted and cited in appellant's opening brief has not been disclaimed or overruled by later decisions. It is still universally recognized that to state a cause of action for reformation on the ground of mutual mistake or of mistake by one party which was known or suspected by the other facts must be set forth and show that the contracting parties "agreed upon a certain thing" which they stipulated should be embodied in their contract and that by mistake it was omitted. It was so held, citing ample authority, in *Harding v. Robinson*, 175 Cal. 534, and is so stated in the other authorities cited in appellant's opening brief, to none of which appellee has referred. It is also still the law as declared in *Auerbach v. Healy*, 174 Cal. 60 and *Nat'l Bank v. Ex. Nat'l Bank,* 186 Cal. 172 (Op. Br. p. 12), that to state a cause of action for reformation based on mistake *it is essential to plead and prove how the alleged mistake occurred.* This rule was recog-

nized, relying upon the Auerbach decision in *Carpenter v. Frolopp,* 30 Cal. App. (2d) 400, 408, in which the pleading met both of the above requirements.

It is equally well settled law that findings are required upon all facts which are essential to the plaintiffs' cause of action and that a fact which must be pleaded must be included in the findings. (24 Cal. Jur. p. 969.)

Hence the *Auerbach v. Healy, Harding v. Robinson, Nat'l Bank v. Ex. Nat'l Bank and Carpenter v. Froloff* decisions are applicable to findings as well as to pleadings and proof.

It is said in 24 California Jurisprudence (p. 964), that "while extreme accuracy of statement and minuteness of detail are not required, findings are insufficient if they merely tend to establish the fact in issue," citing cases, and also "the doctrine of implied findings which formerly prevailed is now abrogated." (24 Cal. Jur. 935, 974; 2 Cal. Jur. 876.)

These rules directly pertaining to the sufficiency of findings and precludes any substantial contention that finding 3 alone or conjoined with findings 4 and 5, find that the parties to the written contract herein stipulated in a prior agreement that well casings should be excluded from the sale. While opposing counsel at first say that Finding 3 alone contains this finding, the argument later made by them in effect concedes that this is not the case and that reliance is really placed on Finding 5. In fact, Finding 3 is devoid of any reference to casings but its language is in substance taken from the written contract and the trial court in its Memorandum of Conclusions construed the language of that instrument to include the casings in the sale.

It must, we believe, be conceded that the most which can reasonably be claimed for finding 5 is that it creates an inference that the prior agreement of sale did not include casings in the oil wells and that the facts found in finding 5 tends to indicate that such was a provision of the prior agreement.

It is certain that finding 5 does not directly or indirectly make any allegation concerning the terms of the prior alleged agreement.

As far as finding "how the mistake was made" the findings are entirely insufficient, although it is found that the defendant was not negligent, which finding, as shown in appellant's opening brief, is, directly contrary to the evidence provided by defendant's own witnesses.

Not all mutual mistakes permit the remedy of reformation of a written contract. Regardless of lack of negligence on the part of one or both parties, the requirement is laid down in the above named cases is that the pleading, and therefore the finding must affirmatively show how the mistake came to be made.

Under the authority of *Auerbach v. Healy, supra*, the language of finding 5 upon which appellee relies is a pure conclusion, and consequently is insufficient for any purpose.

For each of the reasons and upon all of the grounds above elucidated, appellant insists that the Court failed to find that the alleged prior agreement excluded the casings from the sale or contained the other provision which he mentioned in finding 5 which the decree added to the written contract.

V.

Many Other Findings of Material Facts Are Contrary to the Evidence or Are Unsupported by the Evidence.

This assignment has been covered in such great detail in appellant's opening brief (pp. 82-109) and in most respects is so inadequately met in appellee's reply brief that extended discussion herein would only require mere repetition.

However, certain statements and contention by appellee merit our reply.

Appellee first quotes several decisions to the effect that an appellant court "does not weigh the evidence" in cases of this type; that "a mere conflict of testimony as to a mistake * * * does not necessitate a denial of relief" and that the reviewing court only seeks to determine *whether there is substantial evidence in support of findings.*

These are principles which every lawyer knows and even the decisions where judgments have been reversed on the ground that the evidence was insufficient to support the findings or contrary thereto, often have set forth these very general rules, but have disregarded them because they were inapplicable to the record involved. This is the situation in the instant case.

Without repeating, it is pointed out that a mere reading of the discussion of the findings in the opening brief will show that in almost every instance the attack is based upon the ground that there is *no substantial evidence* to support the finding or that such evidence is inherently improbable or unbelievable. In that behalf it is frequently shown that an inference upon which the court rested its

finding cannot legally be drawn because there is no logical connection between the factual basis and the conclusion.

A majority of the evidentiary finding are of this type. Others are not true findings, being bald conclusions, others which are challenged are inherently unbelievable, improbable or irrational.

The reply brief seeks to avoid the necessity of performing the impossible task of refuting appellants' analysis and dissection of the evidence which pertains to finding 8, by quoting from the opening brief the statement, "There is some testimony in support of this finding," and asserts: "This acknowledgement is of itself sufficient to dispose of appellant's attack in view of the authorities cited above concerning the conclusiveness of findings of a trial court supported by *substantial evidence.*" (Italics ours.)

It is plain that appellant's said "acknowledgement" does not contain the word "substantial," and no authority which appellee cites holds that unsubstantial testimony or inherently improbable, unbelievable or irrational testimony is immune from attack on appeal from insufficiency to support findings.

Appellant avows at this time that if the testimony which Finding 8 relies upon can fairly and logically be classed as substantial evidence, it was the right of the court to accept it. However, even in that event appellant will, as it did in the opening brief, contend that such testimony does not permit the inference which constitutes the findings.

Appellee criticizes appellant's citation of *Menning v. Sourisseau*, 128 Cal. App. 635, as authority for the proposition that "every presumption to be invoked is in favor of the correctness of the written instrument and against the alleged prior agreement"

and declares, "The appellate court rejected such contention as a basis for reversal" and quotes from the opinion to that effect. The quoted portion of the opinion [Rep. Br. p. 37] makes it clear that said rejection was based on Section 1844, Code of Civil Procedure, which provides, "The direct evidence of one witness who is entitled to full credit is sufficient for the proof of any fact in civil cases." This law, plus the fact that neither the character of the testimony given by the witness, nor any other evidence tended to deprive the witness of "full credit," amply warranted the decision and was the basis thereof. Obviously, if, as in the instant case, as shown in the opening brief (pp. 85-94) it had appeared that the witnesses whose testimony was relied upon as support for findings 8 and 9, *were not "entitled to full* credit," the judgment in the *Menning* case would have been reversed.

Pages 38 to 42 of Appellee's brief is devoted to an inadequate discussion of appellant's attack upon Finding 8. It is inadequate because it has selected merely a small portion of appellant's argument, torn from the context which is thus shorn of its meaning and effect. Hence, except for one matter, our elucidation of this issue in the opening brief is relied upon as an answer to what appellee has set forth. Appellee points out that the witnesses Montgomery and Kelly gave some information concerning the "management" of the Richfield Corporation, although the opening brief asserts that no evidence shows "what person or group of persons constituted management." It is true that the particular statement quoted from the opening brief is too broad, but the main point which that statement concerns and which was stressed therein, still remains unchallenged which as stated in our opening brief is: The record contains no competent evidence to show

that Richfield Corporation had any intent except as shown by the written instrument and nothing in Finding 8 tends to show a different intent on the part of Richfield, and this necessarily is true because neither by the testimony of Montgomery "nor by that of any other witness did the defendant show that this so-called executive group ever took any action or officially formed or expressed any intent whatsoever." (Op. Br. pp. 91, 92.) Also it was said and shown in the opening brief, by the testimony of various defense witnesses, "management" alone had authority to speak for Richfield (Op. Br. p. 91), and no witness testified that "management" gave any instructions to Davis, Kelly or Montgomery to exclude casings from the sale or officially formed or had an intent to that effect." (Op. Br. p. 94.)

Kelly did say that in August, 1940, a discussion about whether it would be advisable to remove from the derricks the tubing and sucker rods because they were worn out was had "in the meeting at a period after the Anderson contract was executed [Tr. p. 330]; and that those who attended were: the president, Mr. Jones, "three vice presidents, Mr. Morgan, Mr. A. M. Kelly and there was Mr. Montgomery and Mr. Autrey and Mr. Dinkins and Mr. Ragland, and I think that is all," and these persons were "all heads of their respective departments." [Tr. p. 331.]

Kelly further said: Meetings are held regularly one every week, and that "to a large extent" policies of the corporation are determined at said meetings [Tr. pp. 331, 332]. Mr. Montgomery testified that he attends "the executive meetings of Richfield" held once a week and "the president of company and its executive heads" are present at those meetings [Tr. p. 467]; and he said that

at a meeting prior to the time when the tubing and rods were removed from the wells at Casmalia he recommended that this equipment should be removed [Tr. pp. 467, 468].

Appellee's correction is thus acknowledged, and full credit is accorded to the appellee for the fact that it is in the record.

However, it is wholly immaterial to any issue in the case that certain persons and officers of the company habitually attend these executive meetings and "to a large extent" determine policies of the corporation, since there is a total lack of any evidence, testimentary or documentary, that at any executive meeting this executive body ever took any action by resolution, motion or otherwise, pertaining to the selling or retaining of oil well casings or, for that matter, concerning any other question having to do with the transaction with Ferer & Sons; said testimony means nothing in this case in the absence of testimony of some witness that at some executive meeting of this committee or board, some official action was taken by which its intent was formulated, expressed and made known, at least to those present. It is highly significant that in response to appellant's challenge to appellee (Op. Br. p. 92), to point out evidence which shows one or all of the essential facts, without which there could not be and has not been produced any proof that the Richfield Corporation did not intend to sell the casings, the only answer or defense made is by way of pointing out the immaterial and comparatively trivial testimony of Kelly and Montgomery which showed who attended the executive meetings and that they were held regularly and to a large extent determined the policies of the corporation.

Indeed, to stop at this point amounts to a confession that this executive group never determined that the casings should not be sold, and verifies the presumption that since corporation executives who attended these meetings caused the written contract to be executed by which the casings were sold, such was the policy and intent of this committee or board, if any it had, and therefore, such was the intent of the Richfield Corporation.

Findings 11, 12, 13, 14, 16, 17 and 21.

Appellee's attitude and procedure in reference to briefing the issues presented by appellant concerning the above named findings is puzzling. The reply brief (p. 43) reads:

> "Appellant's brief states that the facts covered by such findings have been discussed in the portion of appellant's brief devoted to the motion for summary judgment, and would be repeated. But that portion of appellant's brief necessarily was limited to a discussion of the evidence before the court at the hearing on the motion, to-wit, the affidavits and depositions, and did not discuss the testimony and evidence presented to the court at the trial. Appellant has the duty, in challenging the findings, to point out to this Court the failure or absence of substantial evidence supporting such finding. Appellant wholly fails in such duty and disregards completely all of the testimony and evidence presented to the Court in a trial which occupied several court days. Inasmuch as appellant's attack is so meager, no effort will here be made to prove the sufficiency of each of such findings by references to the testimony and evidence presented to the court at the trial."

The statement which appears in appellant's opening brief to which the foregoing refers will be quoted, from which it is obvious that appellee's statement distorts and unfairly represents appellant's treatment of the above enumerated findings. In that behalf the opening brief reads:

> "Under Caption I appellant has discussed facts found in Findings 11, 12, 13, 14, 16, 17 and 21 as they relate to the court's order denying plaintiff's motion for summary judgment. The affidavits and depositions of the witnesses for both sides were reviewed and analyzed and it was shown that according to the affidavit of Mr. Davis, McGahan had no authority to conduct any negotiations for this sale and that Davis had exclusive jurisdiction of negotiating the sale. It was pointed out that therefore, neither Ferer nor Clements was charged with the notice of anything which McGahan may have said. Also, it was shown that the testimony of Clements and Ferer to the effect that their intent was as expressed in the executed contract, and that said affidavits and depositions contained no substantial evidence tending in any way to belie their testimony but does reveal much in consonance therewith. Insofar as the facts set forth in the above group of findings is concerned the testimony of the same deponents which was given by them at the trial adds nothing to the materiality of said facts and sheds no new light upon them to give them greater or different meaning. Therefore, in the interests of brevity, which appellant is compelled to regard, further elucidation of said facts will be omitted."

An inspection of these findings shows that appellant pointed out the grounds upon which it was claimed that said evidentiary findings contained no facts which were

binding on plaintiff or which constituted notice to Ferer or Clements of anything said by Davis or McGahan.

Appellant denies that it has failed to perform its duty to point out the testimony and evidence from which it appears that said findings are without support therein.

Finding 11 is that on January 8th Harold Davis said to Clements and Ferer that defendant intended to use the wells on the Casmalia property for future production of oil and for that reason declined to include six large storage tanks in the sale.

Finding 12 is that between January 8th, 1941, and execution of the written contract, Harold Davis pointed out to Ferer and Clements on a map a certain gas line from an oil well to the superintendent's house and stated that defendant desired to exclude it from the sale, and that it might be necessary to exclude other gas lines, if the gas from said line was not sufficient to serve said house; that plaintiff did not know the number of wells to which gas lines extended when the contract was executed and that it excepts from the items sold gas pipe lines connecting wells to said house, which exception is also shown on a map attached to said contract.

Finding 13, is that prior to the execution of the written contract, Clements became associated with plaintiff in carrying out said contract and acquire a 1/3 interest in the profits and agreed to pay 1/3 of losses if any, and during negotiations prior to the execution of the contract McGahan said to Clements that the facilities and equipment which defendants proposed to sell were "surface equipment."

Finding 14 is that during the said negotiations, McGahan stated to Ferer that the equipment to be sold

was "surface equipment" and that McGahan had no inventory but would meet Ferer on the premises and point out the particular property proposed to be sold.

Finding 16 states that David Zeidenfeld was in the employ of plaintiff throughout said negotiations and when the contract was executed; that during the period of negotiations Zeidenfeld was told by McGahan that defendant proposed to sell certain equipment and facilities at Casmalia and that it would comprise "surface equipment," and would weigh about 1500 tons and that its nature and quantity could be ascertained by inspection; that later, on the evening of this conversation, Zeidenfeld reported to Ferer that defendant's estimate of the weight of the equipment was roughly 1500 tons, of which 900 tons was pipe and 600 tons was steel, which conversation was prior to plaintiff's written offer of December 10, 1940.

Finding 17 is that after the above found report to Ferer by Zeidenfeld, Zeidenfeld told Ferer that plaintiff, if interested, would have to bid somewhere in the amount of $20,000, and this conversation was prior to the date of said offer.

In another portion of appellant's opening brief the affidavits and depositions of all witnesses who testified to facts pertaining to the matters covered by these findings had been analyzed and discussed in great detail. This elucidation comprises pages 35 to 75 inclusive, and is under Caption I. Everything which could be said opposite to Findings 11, 12, 13, 14, 16 and 17 is set forth in the survey and analysis of the affidavits and depositions of McGahan, Kelly, Davis and Ferer (pp. 35-43), and of the depositions of Zeidenfeld, Clements and Ferer (pp. 55-75). The affidavits are brief and those of McGahan, Kelly,

Ferer and Davis concern, almost entirely, the testimony on which these findings are based, and the same is true of Zeidenfeld's deposition; the portions of the Ferer and Clement depositions which deal with conversations with McGahan and Davis are readily located, and the testimony of all of these witnesses is concisely set forth in the supplement to appellant's opening brief.

Hence, appellant believed, and now believes that to merely repeat what had been once painstakingly set forth could serve no good purpose other than to emphasize appellant's points and arguments and that, in the interest of brevity and court convenience the issues could be best presented by reference first presentation under the previous caption.

It is believed that the argument which the opening brief prepared with great care and much labor conclusively shows that each of this list of findings is either unsupported by or contrary to all of the competent, substantial evidence and that the course employed in the opening brief for presenting the points and contentions in that behalf was fair and proper.

Appellee confines its discussion of Findings 11 and the others of this group to a brief reply to appellant's argument to show that the facts found in said findings do not permit of inferences of any of the ultimate facts and especially that they do not charge plaintiff with knowledge that defendant did not intend to sell the casings or that defendant actually had the intention of retaining them.

In that behalf appellee apparently contends that the testimony concerning the McGahan conversations with Ferer, Clement and Zeidenfeld, even though incompetent, may be the basis of findings which in turn may support

ultimate findings because such testimony was admitted without objections by the defendants. Incompetent evidence is unsubstantial, and an appellate court is not bound by a determination of the lower court which is based on incompetent evidence. (*Estate of Platt,* 21 Cal. (2d) 343, 352; *Rilovich v. Raymond,* 20 Cal. App. (2d) 630.) In the last named case the Court of Appeal disregarded considerable testimony which it said was improperly received on the theory that the contract was ambiguous and the incompetent testimony was offered to dispel the uncertainty. But the Court of Appeal held that the contract was free from uncertainty or ambiguity and considered that the incompetent testimony could not affect its decision. The Supreme Court denied a petition for hearing and in its opinion in *Estae of Platt* cited the *Rilovich* case as authority on this point.

Therefore, appellant believes that the testimony of McGahan as to his statements pertaining to matters outside of the scope of his employment was entitled to no weight as the basis for any finding and should be disregarded on appeal. This principle and rule also excludes like statements by Kelly and representation to Zeidenfeld, who was unauthorized to represent Ferer & Sons in negotiating this contract. Surely statements made by one person to another, neither of whom have authority to represent their employer, cannot be binding upon or be taken advantage of by the employers for any purpose. This result follows, not merely because the law so holds, but for the sound reason upon which the law is based,

that representations made outside of the scope of the employee's employment cannot be any more dependable than similar assertions coming from a total stranger and in both instances the statements are hearsay which no one to whom their contents is impartial would be justified in giving credence.

Finding 15.

Appellee asserts that "The common meaning of the phrase 'surfact equipment' had significance because of the knowledge and suspicion of Richfield's intention which McGahan's statements about 'surface equipment' gave to appellant."

Since, as the opening brief claims and shows, McGahan had no authority to negotiate a contract for defendant or to make any representations about the matter, those to whom they were made had no duty and no right to rely upon what he said any more than they would if the representations had emanated from Richfield's messanger boy. Appellee does not maintain that McGahan was authorized to contract for defendant or to carry on negotiations preliminary thereto. Without such authority statements by him concerning the deal could not bind his employer, and it necessarily follows that the employer cannot predicate liability upon others by reason of them.

We find nothing in appellee's arguments relative to Findings 18 which is not refuted in appellant's presentation of the issue in the opening brief. The same is true of appellee's discussion of finding 22.

Finding 29.

This is the finding by which the Court absolves the defendant of all negligence in the instant transaction. Appellant's opening brief insists that this finding is definitely contrary to a mass of evidence and has no support in any evidence. It points out that it is grossly inconsistent with other findings in which the court determined that all of defendant's employes knew that the oil well casings were to be excluded from the sale, and yet Mr. Paradise drafted the contract which included the casings. He did so under directions from Kelly and Montgomery, so that either he or both of them were negligent in that matter. Both Kelly and Montgomery read the contract after it was drafted and Kelly executed it for the defendant, and their failure to require that the writing be so altered as to exclude the casings was undoubtedly negligent.

McGahan also read the contract before it was executed, and was negligent just as were the others. Davis and Kelly were both negligent in leaving out of the letter accepting Ferer's written offer, any provision excluding the casings, and this negligence was gross because the offer definitely included them. Montgomery gave Davis instructions as the certain items to be excluded from the sale. He was negligent in not informing Davis that casings must be excluded, or else Davis was negligent in failing to follow such directions.

If all of the employees knew that the casings were to be excluded, it was gross negligence for none of them who contacted Ferer, or Clements (if, as the court found notice to Clements was notice to the defendant) to tell these men in plain language that the well casings were not to be sold,

and according to their own testimony neither McGahan, Davis or Kelly ever did so. Such conduct, appellant contends, was fraud and especially so because defendant's employees knew that plaintiff was a dealer in junk, and presumably would not be familiar with such a term as "surface equipment." According to said employees of defendant they had been told that only "surface equipment" was to be sold, yet everyone of them read the draft and Davis and Kelly read Ferer's offer, neither of which documents contained the term "surface equipment" and both of which specified "all equipment," yet none of those capable employees said or did anything to correct, what they were bound to know was a most serious error—if their own testimony is believed.

Appellant has stated, and again states, the picture thus presented makes a *prima facie* case of deliberate fraud perpetrated against the plaintiff. Opposing counsel were challenged in the opening brief (p. 105) to "produce an example of greater negligence in any business transaction."

They not only fail to meet the challenge but fail in their attempt to show anything in the record which serves to excuse or mitigate the foregoing gross negligence and apparent fraud. Their only response is a reference to certain cases, previously cited, which say that courts of appeal will not weigh evidence where there is "some" substantial testimony or other proof to sustain a finding; also an extended quotation from one decision to that effect and the citation of four decisions in all of which the only

mistake or negligence shown is called an "inadvertence" upon the part of one who failed to read, or read but failed to note, a provision in a writing which was not intended by him to be placed therein. The California cases are: *Los Angeles v. New Liverpool Co.*, 150 Cal. 21; *Sullivan v. Moorhead,* 99 Cal. 157; *Seim v. Cooper,* 79 Cal. App. 748. *Columbian Nat'l Ins. Co. v. Black,* 35 Fed. (2d) 571 is like the others factually and the decision is the same, except that instead of designating the mistake of the party who sought reformation as an "inadvertence," this decision says: The negligence, "if any consisting in not reading, line for line, the printed form, or of failure to notice" the word "endowment" at the bottom of the table of values. Comparison of these examples of "inadvertence" or "negligence, if any" with the conduct of defendant's employees in this case is left without further comment, but appellant believes that no case can be found where negligence such as that herein shown has not barred the party from the remedy of reformation of a written instrument. Appellee devotes a far greater space in an attempt to show that appellant was negligent than is used in its endeavor to palliate the conduct of defendants' employees. However, the trial judge failed to find that the plaintiff was guilty of any negligence and if it had been even grossly negligent, this would be wholly irrelevant to the issue and could not serve to sustain the unsupported Finding 29 which in effect declares that the defendant was free from negligence.

Finding 30.

Appellee contends that no finding was required upon the interpretation of the written contract which was sought to be reformed, because, it is said "the relief of reformation granted to the appellee" rendered a finding on that matter unnecessary.

Appellee puts the "cart before the horse." Its counsel would have the judgment to be rendered support a preceding finding rather than require that the finding support the judgment. Had the court elsewhere found that the written agreement provides that the well casings are thereby sold to Ferer & Sons and that it was made its duty to abandon the wells and dismantle and remove the equipment a finding as to other portions and provisions might not have been required. However, the trial court failed to make such specific findings and to thus squarely repudiate its language to the contrary in its "Memorandum of Conclusions." Hence appellant insists that Finding 30 constitutes error.

VI.

The Written Contract Dated January 17, 1941, Is Clear and Unambiguous and Transfers the Oil Well Casings to the Buyer. No Surrounding Circumstances Tend to Contradict It.

Appellee's Caption V states a proposition directly to the contrary of the above assertions. In support and verification of the averment, that the written contract is clear and unambiguous and conveys the casings to the buyer, appellant believes that Judge Hollzer's "Memorandum of Conclusions" suffices to refute and expose the fallacies in appellee's argument. With that document in the record and a vital issue throughout, it is noteworthy and significant that appellee fails to mention it and makes no attempt to point out any particular in which Judge Hollzer's reasoning was unsound or any matter which he may have overlooked. Under "(a)" of appellee's brief, discussing this issue, much stress is placed upon the use of the word "on" in the term "on the land" as employed in the contract.

It is said in *Burnham v. Claiborne,* 107 La. 513, 32 S. W. 87, "The terms 'on' and 'upon' have an almost inexhaustible variety of meanings." (46 Cor. Jur. p. 1075.) In *Arbez v. Wheeling etc. R. Co.,* 33 Va. 1, 105 S. E. 14, 5 L. R. A. 371, it was held that "on" meant "below" when used in an act empowering municipalities to grant corporations the right to use public streets for and to construct railroads upon them, the issue being the right of such a corporation to cut a hill well below the street grade, and it was said that "on" did not mean "on the surface" in the statute involved. Appellee states that appellant's (Judge Hollzer's) interpretation of the con-

tract in this case would have read, "of equipment 'on and in and under the land.' "

In *Schmohl v. Travelers' Ins. Co.,* 177 S. W. 1108 (Mo. a), it was determined that "on" imported "on and within," and this term has often been construed to include "under."

In *Schroeder v. State,* 162 N. E. 647 (Oh. a) it was held that "on" meant "attached to," which would clearly include all oil well equipment and facilities, among which are the casings.

It fairly appears from Words and Phrases that the meaning of the word "on" is determined by the context in which it is found, and it was by this means that the trial court arrived at the decision with which appellee disagrees.

(b) Appellee invokes the maxim, *expressia unius est exclusio alterino* without seeming to realize that the rule thereby stated provides an almost unanswerable reason for concluding that the oil well casings were *not* excluded from the sale. Perhaps, like the man at the foot of the mountain, close proximity to the picture hid from the view of opposing counsel the provision in the contract to which alone the maxim has direct and cogent application. The instant contract bears no resemblance to the agreement involved in *Althoff v. Althoff*, 123 Pac. 326 (Colo.). In that contract the provisions descriptive of the articles to be sold purports to enumerate the items, and contains no general provisions within which the property in suit could be classed. It begins, "The property proposed to be sold includes goodwill," and then follows a long list of items, and ends, "and all things in general and owned and used by said firm in the conduct of the business at #1411-15

Wazee Street." The controversy arose over certain stock of some corporation value at $16,000 which the plaintiff owned. It is obvious that such stock did not come within the portion of the enumeration last quoted and the court properly applied the maxim *expressio unius,* etc. On the other hand, the instant contract, in describing the property to be sold, begins "all of the equipment and facilities located on said land, together with," etc., and then follows an enumeration of items, at the end of which comes a *second list which consists of items excepted from the sale.*

This second list is typical of the type to which the maxim *expressia unius est exclusio alterius* applies. The provisions concerning it reads: "It is expressly understood and agreed that the following items of equipment and facilities located on said land above described are excepted from the foregoing and shall not be included in said sale nor shall the same be dismantled or removed by the buyer." Then follows nine items, and oil well casings were not among them. Although not naming the maxim, the Memorandum of Conclusions clearly shows that it was in the Court's mind and that from it he deducted that since the well casings were not included in the specific enumeration of excepted items, it was intended to be sold. After reciting the substance of provision of the contract beginning: "seller covenants and agrees to sell buyer, subject to exceptions hereinafter provided, all of the equipment and facilities located on the land," the Memorandum of Conclusions reads:

"It further appearing from the terms of said contract that the casing in the oil wells was not enumerated or described among the items of equipment and facilities thus expressly excepted from said sale; and

It further appearing from the terms of said contract that plaintiff agreed at its sole expense to perform certain work, and that such work should include, among other things, the dismantling, removal and disposition of ALL equipment and facilities to be purchased by them, also the filling in and leveling off of all ditches and pits created by their work in removing pipe or other equipment; also that in addition plaintiff should remove from said land ALL equipment, facilities AND OTHER PROPERTY located on said land, EXCEPTING ONLY the items expressly excluded under the provisions of paragraph one of said contract; also that all work to be performed by plaintiff should be performed in strict compliance with all rules, regulations and other requirements of the County of Santa Barbara, the State of California and of any other governmental authorities. The Memorandum, continuing, indicates that all inclusive language used in describing the property sold and the omission from the list of excluded items of well casings, were the two elements of the contract which led the Court to conclude:

The Court concludes that under the terms of said contract the defendant sold and conveyed to plaintiff the casing in the oil wells on defendant's land described in said contract. One other element might have been pointed out. It forever clinches the two upon which Judge Hollzer relied, among the items excepted are at least two which are not surface equipment or facilities. These are item "(b). That certain water pump," etc., and certain other pumps in "(i)."

Defendant's witnesses McGahan and Kelly testified that they were told that *all surface equipment* was to be sold and that they so informed plaintiff's employee Zeidenfeld,

Mr. Clements and Mr. Ferer. Appellee's brief repeatedly makes much capital of this testimony, yet the contract excepts items of this character, which, of course, would not have been done or thought of by defendant if they believed that no surface equipment or facilities were included in the provision, "all of the equipment and facilities," which initiates the description of the property to be sold. Indeed, appellant does "seriously" assert that the contract is clear and unambiguous in its inclusion of the casing among the items of property which were sold to it. Appellee's reason "(c)" (Rep. Br. p. 60), is easily eliminated. Gas could be taken from the wells even if the casings were removed. Appellee concludes: Such ambiguities, contradictions and repugnancies would result if the contract should be interpreted to include the casings, permit parol evidence of surrounding circumstances and the intention of the parties. The only ambiguity which appellee mentions is attempted to be shown in the above mentioned "(c)" and its brief fails to point out any ambiguities or contradictions. Hence no case is made out warranting evidence to explain the terms of the contract. It is true, as appellee reputedly asserts, that such evidence was received, at least principally without objections by plaintiff's counsel, but this fact cannot change its quality and make believable, substantial competent evidence from that which, if received over objections, would have been inherently incredible, improbable, unbelievable, and therefore not substantial evidence. Appellee's statement on page 62 of its brief wherein it purports to state the grounds assigned by appellant before the trial court for the contention that the contract included the casings in the sale consists of child-like distortion. At all times during this litigation the appellant has based its said contention

upon the identical grounds which Judge Hollzer set forth in the Memorandum of Conclusions. The items named in appellee's brief were perhaps mentioned incidentally only, and as having some tendency to support appellant's argument which was based upon the aforesaid grounds which appellee neither in the trial court nor on appeal has met with any substantial answer, and the straw-man device employed by appellee will hardly distract attention from them.

Plaintiff's Exhibit 2.

Just before the "conclusion" in appellee's brief, it is pointed out that Plaintiff's Exhibit 2 fails to mention "producing equipment or facilities," suggesting that this is final and conclusive evidence that appellant did not expect to purchase such property as well casings. Again appellee has overlooked the true picture. Said Exhibit 2 uses other language to express the same stipulation which Mr. Paradise, appellee's attorney, placed in the written contract, which is "all of the equipment and facilities." Mr. Ferer's language in Plaintiff's Exhibit 2 is, "and all other materials," etc., and the fact that defendant's authorized agent so understood this language and did not then intend to retain the casings is established by Plaintiff's Exhibit 3 in which defendant, through H. H. Kelly, accepted the offer made in Plaintiff's Exhibit 2, using the equally all-inclusive term "and other material and equipment belonging to Richfield, located on our Soladino lease in Casmalia, with the following exceptions," which exceptions fail to name well casings.

The written contract follows the foregoing offer and acceptance in substance but in greater detail, and exactness

of expression, and in the phraseology of the lawyer, Mr. Paradise. The nearest approach to a prior contract which the record reveals is found in Plaintiff's Exhibits 2 and 3 and they preclude and belie the findings of mistake by one party, suspected by the other, and prove that the contract of January 17th was deliberately so drawn as to convey the well casings and that such was and had always been the intention of the defendant. Appellant's counsel are more fully convinced, after studying the reply brief than before, that the judgment should be reversed with direction to the lower court to set aside and grant plaintiff's motion for summary judgment and to set aside all orders which interfere or conflict with this procedure.

Conclusion.

By reason of the inadequacy of appellee's reply brief in its attempt to sustain the judgment herein or to overcome appellant's attacks thereon as set forth in the opening brief added assurance that such attacks are meritorius is provided. It would have been an almost endless task to note every inaccuracy or fallacy in the reply brief.

Perhaps the most obvious error in the appellee's contention that appellant was not prejudiced by the denial of its motion for summary judgment and the order dismissing the declaratory relief count has not been mentioned. The reason advanced by appellee for this claim is that everything involved in the decision by these orders was adjudicated after the trial. The fallacy of this reason necessarily results from the fact that had the court erroneously made said orders there would have been no trial and judgment must have been rendered in effect quieting appellant's title to the well casings and affording other relief incidental thereto. It seems that appellee's

brief exhibits certain erroneous concepts in which the trial court also apparently indulged. It is quite certain that this type of error in respect to the nature and scope of relief authorized by the Federal Declaratory Judgments Act, otherwise the court would not have dismissed the declaratory relief count of the amended complaint, because it certainly had jurisdiction to entertain the cause of action therein set forth, and when a statute confers jurisdiction upon a court it is the court's duty to exercise it. (1 Cal. Jur. pp. 587, 588.)

Appellee has much to say in this behalf and upon other issues concerning the court's discretion, which it is said appellate courts are loathe to review and will only do so in clear instances of abuse of discretion. This is undoubtedly another subject upon which appellee and the trial court have misconceived the law. It was declared in *Miller v. Carr*, 116 Cal. 378, that a court's discretion "is not a mental discretion to be exercised *ex gratia* but a legal discretion to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice. In a plain case discretion has no office to perform, and its exercise is limited to doubtful cases where an impartial mind Resitates."

In *Cargnani v. Cargnani*, 16 Cal. App. 96, 102, language is used to the same effect and Chief Justice Marshall's opinion in *Osborn v. United States Bank*, 22 U. S. 738, is quoted which announces the same principle. In the *Cargnani* case no statute directed that the wife be allowed costs on appeal, but it was held that the trial court abused its discretion in not ordering the husband to provide such costs. In *Sharon v. Sharon* an allowance of counsel fees to pay the wife's six lawyers was held an

abuse of discretion, and it was said: The discretion of the court below is a legal discretion, to be reasonably exercised. "Abuse of discretion" in making such orders does not necessarily imply a willful abuse, or intentional wrong. In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason—all the circumstances before it being considered. In the instant case the declaratory judgment count set forth "a plain case" for the relief provided by law. Hence the Court had no discretion to exercise. It is elementary that an inference is a conclusion which may *reasonably* be drawn from proven facts. The Court, therefore, had no discretion to exercise and abused its discretion, if any is contemplated in such matters, in the inference drawn in many of the probative findings; for example, the inference that because the parties had carried on negotiations for several weeks, they must have entered into an oral agreement which the written agreement was intended to embody. It was Blackstone who defined law as the soul of reason. Certain it is that to draw an arbitrary, conjectural inference not founded upon reason or logic, is not an exercise of a legal function.

Upon each and all of the grounds set forth heretofore appellant prays that the judgment herein be reversed with appropriate instructions to the lower court.

Respectfully submitted,

CARL B. STURZENACKER &
PHILIP N. KRASNE,
Attorneys for Appellant.